Office-Supreme Court, U.S.
FILED
MAY 9 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1577

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FORRO PRECISION, INC.,

Petitioner,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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May 6, 1985

QUESTION PRESENTED

Did the court of appeals err in affirming summary judgment dismissing a California common-law tort claim on the basis of its determination that respondent's solicitation of a police investigation of criminal trafficking in its trade-secret designs and its subsequent participation, at police request, in the execution of a judicially-issued search warrant were absolutely privileged as a matter of California law?

RULE 28.1 STATEMENT

Respondent International Business Machines Corporation (IBM) has no subsidiaries which are not wholly owned, except Discovision Associates. IBM is also a partner in Satellite Business Systems. IBM is not a subsidiary of any other company.

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STATEMENT OF THE CASE

The California common-law intentional interference claim as to which review is sought had its genesis in a 1974 complaint filed in the district court for the Northern District of California. That complaint presented only a federal antitrust claim. Petitioner was subsequently granted leave to amend its complaint to add a pendent state-law claim for

intentional interference with prospective business advantage.[1] (CR 95.)[2] The amended complaint asserted that IBM had intentionally interfered with petitioner's prospective business advantage by providing misleading information to the Santa Clara County, California authorities, and thereby causing a police investigation of petitioner and a subsequent search of its business premises. (CR 87, ¶¶ 22, 57.) The added claim likewise challenged IBM's subsequent assistance of the police in the execution of a search warrant. IBM counterclaimed alleging petitioner's misappropriation of trade secret designs for various IBM products. (CR 7, CR 115.)

The case was tried to a jury in 1977. It failed to reach a verdict on the antitrust claim, and the trial court subsequently granted IBM's Motion for Judgment pursuant to F.R.C.P. 50(b), finding that petitioner had failed to establish a prima facie claim under Section 2 of the Sherman Act.[3] (CR 266.)That ruling was later affirmed by the court of appeals,[4] and is not a subject of the present petition.

With respect to the interference claim, petitioner presented evidence that petitioner's business had been adversely affected by news and trade media reports through which its customers learned that its facilities had been among a number of locations searched as part of a police investigation of illicit trafficking in stolen IBM drawings. In charging the jury on that common-law claim, the trial court

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[1] Petitioner's amended pleading asserted five other common-law claims which were disposed of on summary judgment prior to trial. (CR 179; CR 291, pp. 120-22.) None is a subject of the present petition.

[2] "CR" refers to the Clerk's Record, and the filings therein are referred to in accordance with the Clerk's numbering system. "R" refers to the trial transcript.

[3] 15 U.S.C. § 2.

[4] *Forro Precision, Inc. v. International Business Machines Corp.*, 673 F.2d 1045, 1062 (9th Cir. 1982).

declined to instruct on the statutory privilege contained in Section 47(2) of the California Civil Code which accords absolute immunity to certain communications made to government officials. It likewise declined to instruct on the California common-law privilege related to IBM's police-requested participation in the execution of the search warrant. (R 2948-49.) In the absence of such instruction, the jury returned a verdict in favor of petitioner on the common-law interference claim. (CR 237, 238.) The jury also returned a verdict in favor of IBM on its trade secret counterclaim. (CR 239.) Neither verdict was disturbed on post-trial motions. (CR 266.)

On cross-appeals from the 1977 trial court judgment, the court of appeals affirmed IBM's trade secret misappropriation award, noting abundant evidence of petitioner's trafficking in stolen IBM drawings. *Forro Precision, Inc. v. International Business Machines Corp.*, 673 F.2d 1045, 1057 (9th Cir. 1982) [hereinafter *"Forro I"*] reproduced in Petitioner's Appendix A, at 17-18. However, the court of appeals reversed and remanded the judgment on the intentional interference claim, holding that the trial court had erred in failing to accord IBM the benefit of California's statutory and common-law privileges. (*Forro I*, App. A, at 16.)

On remand, IBM moved the district court for summary judgment on the ground that the sole proximate link between petitioner's claimed injury and the IBM conduct evidenced in the record consisted of communications and search participatory activity held absolutely privileged in *Forro I*. (CR 332, pp. 17-21.) In its opposition, petitioner made no further factual showing, but argued instead that the California statutory privilege was not absolute and did not extend to half-truths or statements amounting to "fraudulent silence." (CR 334, pp. 4-6, 11-12; CR 344, pp. 14-15, 17.) The district court entered summary judgment,

finding that the damage claimed by petitioner resulted entirely from absolutely privileged conduct. (CR 340, Order Granting Summary Judgment, reproduced in Petitioner's Appendix B, at 28-29.)

The court of appeals affirmed. *Forro Precision, Inc. v. International Business Machines Corp.*, 745 F.2d 1283 (9th Cir. 1984) [hereinafter *"Forro II"*], reproduced in Petitioner's Appendix C, at 31. In so doing, it reaffirmed its earlier holding that the California statutory privilege was absolute in nature, and rejected petitioner's "fraudulent silence" theory as incompatible with California's statutory policy of encouraging fullest citizen communication with governmental authorities. (*Forro II*, App. C, at 33-34.)

STATEMENT OF FACTS

Petitioner Forro Precision, Inc. is a precision machine shop which, since 1968, has specialized in producing metal parts for electronic data processing devices. (R 1354-56.) Respondent IBM is a developer and manufacturer of a complete line of electronic data processing equipment. Among the equipment offered by IBM are randomly accessible auxiliary data storage devices known as disk drives.

In late 1970, IBM became aware for the first time that future disk product designs then in development at its San Jose, California laboratory had become the subject of an illicit market. (R 278; PX 437, p. 3.) Reports circulated at an October 1970 trade show that blueprints for IBM's 3330 "Merlin" product, then nearly a year away from initial customer shipment, could be purchased in an emerging underground market. Discovery in a state-court trade secret action, *IBM v. Memorex*, indicated that petitioner was supplying Memorex with certain machine parts which were identical to critical "Merlin" parts well before IBM's initial shipment of its "Merlin" product.

Having suffered compromise of its "Merlin" design, IBM in early 1973 was confronted with additional rumors that the design of its yet-to-be-shipped "Winchester" device was likewise "out." Using a suspected former "Merlin" trafficker as a go-between, IBM commenced an internal investigation which revealed that a "source" still existed within its laboratory, and that IBM's new technology was indeed available for a price. (R 1860, 1863-65.) In April 1973, IBM approached local prosecutorial and law enforcement authorities with its information, and based thereon, the San Jose Police Department and the Santa Clara County District Attorney's Office initiated a criminal investigation under their exclusive control. (R 689-90, 2067-68.) A series of police-monitored meetings of the go-between and his inside contact, together with information supplied by IBM, indicated that Forro, among others, was linked to the trafficking in confidential IBM designs. (PX 425, pp. 28, 29.)

In going to the authorities, IBM hoped to obtain both the identification of its inside source and the prosecution of those who had been criminally trafficking in its proprietary designs. (R 1274, 1959, 1969-70.) In addition, some IBM security officials had hoped that the "thunderclap" of publicity which would accompany any such prosecution would serve to put the industry on notice that the willful misappropriation of IBM trade secrets involved criminal misconduct. (R 1001-03.)

On the basis of an affidavit drafted by Santa Clara County Deputy District Attorneys and executed by a San Jose Police Department Officer, the authorities sought a search warrant of petitioner's facility. (PX 425.) Although the affidavit largely reflected information provided by IBM, the record is uncontradicted that IBM had no part in preparing the affidavit or in the prosecutorial decision to seek a warrant. (R 727, 966, 978.) On June 27, 1973, a

municipal court judge issued a warrant for the search of Forro's facility, and the warrant was executed two days later at Forro's Los Angeles plant. (PX 424, PX 425.) The search was conducted under the supervision of the San Jose Police Department. (R 2027, 2033.) At the written request of the San Jose Police Chief, IBM employees were present to aid in the identification of technical data falling within the call of the warrant. (DX 6559, R 665.)

It is uncontested that each IBM employee was accompanied by a police officer at all times. (R 1406, 2023-26.) Although IBM employees provided technical assistance, it was the police who established the search guidelines and made the final determination as to what to seize. (R 1652-53, 2027, 2033.)[5] The search produced numerous "Merlin" drawings. (R 1651-52; PX 423.) Although there had been some leads suggesting that Forro was producing replicas of components for IBM's yet-to-be-shipped "Winchester" disk drive (PX 437), no such drawings were uncovered during the search. However, the undisturbed jury verdict on IBM's counterclaim established that petitioner had in fact previously solicited and obtained "Winchester" drawings from a European contractor who was producing parts for IBM Germany pursuant to a confidentiality agreement. Petitioner's president, who admitted hiding drawings during the search, later assured his concerned European source that no "Winchester" drawings had been found by the police. (R 2345.) While several of the other subjects of the police investigation were indicted and convicted, no charges were filed against Forro.

[5] Forro made no effort to challenge the validity of the search warrant which had been issued by the Los Angeles municipal court, nor did it seek return of the seized drawings. (R 1400-02, 1414-15.)

REASONS FOR DENYING THE WRIT

I. THE CONTROLLING ISSUES OF STATE LAW RAISED BY PETITIONER OFFER NEITHER SPECIAL NOR IMPORTANT REASONS TO INVOKE THE COURT'S DISCRETIONARY POWER OF REVIEW, AND NO COLORABLE FEDERAL ISSUES ARE PRESENTED.

This Court has long recognized that the ultimate responsibility for determining state law resides not with it but with the highest court of the State. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Accordingly, where reasonable arguments have been advanced to support a determination of state law made by a federal circuit court, this Court has found it "wholly unprofitable for us to analyze [the state] cases on the point." *Spiegel's Estate v. Commissioner of Internal Revenue*, 335 U.S. 701, 708, *reh. denied*, 336 U.S. 915 (1949). It has for that reason become the policy of the Court to "accept and therefore . . . not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). Indeed, as Rule 17.1 of the Rules of this Court admonishes, discretionary review should be granted only for "special and important reasons," and that is doubly so where the controlling questions are of local law.

Here the court of appeals' disposition of petitioner's common-law interference claim turned exclusively — and correctly[6] — upon (1) a California statutory privilege which has been definitively interpreted in scope and force by the California Supreme Court;[7] and (2) upon a California common-law policy of encouraging citizen assistance of law

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[6] *See* Section II, *infra*.

[7] *Albertson v. Raboff*, 46 Cal.2d 375, 379, 295 P.2d 405, 408 (1956); *Ball v. Rawles*, 93 Cal. 222, 236, 28 P. 937, 941 (1892).

enforcement agencies which has likewise been accorded clear recognition by the California Supreme Court.[8] Little purpose would be served by a review of California's statutory and common law, entirely local in its operation, and in any case subject to ultimate state-court control regardless of this Court's intervention.

Petitioner's effort to conjure an issue of federal concern is both substantively mistaken and unsupported by its procedural positions below. In a desperate search for a constitutional issue, petitioner accuses the *Forro I* court of "begging" the appellate court's purported duty to make a *de novo* review of the constitutional breadth of the Los Angeles municipal court's heretofore unchallenged search warrant. (Petition, at 22.) While the court of appeals would have such a duty in considering an appeal from a criminal proceeding in which a warrant was challenged, this was a civil case in which the warrant was not challenged and in which its constitutionality bore on none of the elements of the claim. Moreover, petitioner's failure to raise the purported constitutional issue in the trial court or in the circuit court on either appeal bars any review here.[9] *Ellis v. Dixon,* 349 U.S. 458, 460, *reh. denied,* 350 U.S. 855 (1955); *see Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981).

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[8] *Sokol v. PUC,* 65 Cal.2d 247, 257-58, 418 P.2d 265, 272, 53 Cal. Rptr. 673, 680 (1966); *Peterson v. Robison,* 43 Cal.2d 690, 697, 277 P.2d 19, 24 (1954).

[9] Similarly misplaced, both procedurally and substantively, is the assertion that application of an absolute privilege which takes the liability determination from the jury amounts to a denial of Seventh Amendment rights. (Petition, at 1.) Petitioner ignores a court's constitutionally permissible power to terminate an action short of a jury verdict where as a matter of law there is no basis for imposing liability. *Ex Parte Peterson,* 253 U.S. 300, 309-10 (1920); *see Fidelity & Deposit Co. v. United States,* 187 U.S. 315, 320 (1902). Moreover, in neither of its appeals below did petitioner raise any Seventh Amendment issue.

II. THE COURT OF APPEALS CORRECTLY APPLIED APPLICABLE CALIFORNIA LAW.

The court of appeals twice considered IBM's communications with police authorities and its participation in the search at police request. In the first instance it held that the trial court had erred in failing to accord IBM the benefit of California's absolute privileges and in the second instance it held that the trial court had on the record before it properly entered summary judgment on the basis of those privileges. In reaching both determinations the court of appeals applied settled state law directed at the promotion of clearly enunciated statutory and common-law policies.[10]

A. IBM's Communications With the Authorities Were Absolutely Privileged.

As a matter of long-standing statutory mandate, California encourages the fullest degree of communication between citizen and government. Section 47(2) of the California Civil Code, adopted in 1872, declares statements made "[i]n any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law" to be privileged. (Enacted 1872; amended Code Am. 1873-74, c.

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[10] Petitioner's assertion that the court in *Forro II* failed to follow the law of the case betrays a fundamental misunderstanding of tort law. (Petition, at 27.) Petitioner does correctly observe that *Forro I* rejected a challenge to the sufficiency of Forro's damage evidence, and held that there need be no trial of the damage issue on remand. (*Forro I*, App. A, at 7.) However, it is axiomatic that regardless of injury in fact, a plaintiff sustains no recoverable damage unless that damage flows from conduct giving rise to liability. *Buckaloo v. Johnson*, 14 Cal. 3d 815, 827-28, 122 Cal. Rptr. 745, 752, 537 P.2d 865, 872 (1975); Restatement (Second), Torts, § 766. On remand, the trial court held on summary judgment, and the court of appeals affirmed, that there was no non-privileged IBM conduct on which to causally predicate liability for the exclusively search-related damage claimed by petitioner. (Memorandum, App. B, at 29; *Forro II*, App. C., at 35.) No violence is done to the doctrine of law of the case in hewing to the proposition that without conduct giving rise to liability there can be no recoverable damage.

612, p. 184, § 11.) Judicial interpretation has confirmed that the privilege is absolute and that the policy it seeks to advance would be frustrated if it were reduced to a qualified privilege subject to a jury's determination. *Albertson v. Raboff*, 46 Cal. 2d 375, 379, 295 P.2d 405, 408 (1956); *Imig v. Ferrar*, 70 Cal. App. 3d 48, 55-56, 138 Cal. Rptr. 540, 543 (1977).

The privilege attaches without regard to the presence of malice or ulterior motive on the part of the declarer. *Albertson v. Raboff*, 46 Cal. 2d at 379, 295 P.2d at 408-09; *Tiedemann v. Superior Court*, 83 Cal. App. 3d 918, 926, 148 Cal. Rptr. 242, 248 (1978); *Pettitt v. Levy*, 28 Cal. App. 3d 484, 488, 104 Cal. Rptr. 650, 652 (1972). It extends to communications designed to initiate a proceeding, including specifically criminal proceedings, as well as those made in the course of an existing proceeding. *Ball v. Rawles*, 93 Cal. 222, 236, 28 P. 937, 941 (1892); *Martin v. Kearney*, 51 Cal. App. 3d 309, 311, 124 Cal. Rptr. 281, 282 (1975). Moreover, the underlying state policy of encouraging citizen communication is viewed as of such paramount importance that any reasonable doubt concerning the applicability of the privilege must be resolved in favor of according the privilege. *Brody v. Montalbano*, 87 Cal. App. 3d 725, 733, 151 Cal. Rptr. 206, 212 (1978), *cert. denied*, 444 U.S. 844 (1979); *Twyford v. Twyford*, 63 Cal. App. 3d 916, 926, 134 Cal. Rptr. 145, 150 (1976).[11]

[11] Petitioner trivializes the Section 47(2) privilege by suggesting that resolution of doubts in favor of the privilege somehow obtains only in proceedings involving domestic disputes. (Petition, at 27 *citing Twyford v. Twyford.*) The statutory policy favors the privilege whether a statement is uttered in a domestic relations proceeding, is discussed at a public meeting, or is communicated in the course of any other official proceeding recognized by law. *Imig v. Ferrar*, 70 Cal. App. 3d 53, 55, 138 Cal. Rptr. 540, 543 (1977); *Scott v. McDonnell Douglas Corp.*, 37 Cal. App. 3d 277, 293, 112 Cal. Rptr. 609, 620 (1974).

That is the settled California law which confronted the court of appeals in assessing petitioner's common-law interference claim and its argument that no privilege was applicable. In *Forro I*, the court of appeals fully adverted to petitioner's contention that IBM had in part an impermissible ulterior motive in contacting the authorities — to create a detrimental "thunderclap" of publicity — but correctly noted that under California law malice is irrelevant so long as the communication has some legitimate connection to the proceeding. *(Forro I*, App. A, at 13.) The court pointed out that the record was uncontradicted that "the company's communications to the authorities were made for *law enforcement purposes* as well as for the purpose of creating publicity." (*Forro I*, App. A, at 16; emphasis supplied.) That legitimate purpose supplied the necessary "connection" between the communication and the proceeding so as to make the privilege applicable as a matter of law. *Rader v. Thrasher*, 22 Cal. App. 3d 883, 888-89, 99 Cal. Rptr. 670,673-74 (1972); *Smith v. Hatch*, 271 Cal. App. 2d 39, 46, 76 Cal. Rptr. 350, 354 (1969).

The *Forro I* court likewise noted the substance of Forro's "fraudulent silence" contention: "IBM failed to inform the police that a protective order shielded the depositions on which the affidavit in support of the search warrant was based, failed to disclose that IBM's counsel had returned without restriction the Merlin drawings produced at depositions, and misled the authorities into thinking that the designs were trade secrets." *(Forro I*, App. A, at 13.) Nevertheless, the court followed California law which requires the full benefit of the privilege to be accorded even misleading statements. *Pettitt v. Levy*, 28 Cal. App. 3d at 489, 104 Cal. Rptr. at 653; *Kachig v. Boothe*, 22 Cal. App. 3d 626, 641-42, 99 Cal. Rptr. 393, 403 (1971). And *Forro II* made express the court's recognition of the illogic of petitioner's theory that one could claim privilege for what he

said, but not for what he failed to say. (*Forro II*, App. C, at 33-34.)

Petitioner's claim that the court of appeals overlooked an intermediate California appellate authority, *Frisk v. Merrihew*, 42 Cal. App. 3d 319, 326, 116 Cal. Rptr. 781, 785 (1974), is flat wrong. (*Forro I*, App. A, at 9.) Moreover, even if good law,[12] petitioner obtains no benefit from Frisk's observation that, in the absence of facts permitting but one conclusion, it is for the jury to decide whether a privileged occasion was abused by reason of the communication's failure to bear a reasonable relationship to the official proceeding. Given the conclusive effect of the jury's counterclaim finding of trade secret thievery,[13] there is but one conclusion as to whether IBM, at least in part, had legitimate cause for invoking police assistance. As the *Forro I* court noted, "The jury's verdict . . . indicates that IBM had cause to seek help from the police, and our review of the record supports that finding." (*Forro I*, App. A, at 24-25.)

Nor did the court of appeals misinterpret California case law in rejecting the argument in *Forro II* that IBM's communication should have been denied protection because they were part of a broader, transcendent scheme. (Petition at 28, *citing, Gruenberg v. Aetna Insurance Company*, 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973).) As the court of appeal noted, the insurance company in *Gruenberg* had engaged in actionable conduct which

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[12] *But see, e.g., Brody v. Montalbano*, 87 Cal. App. 3d 725, 733, 151 Cal. Rptr. 206, 212 (1978), *cert. denied*, 444 U.S. 844 (1979); *Imig v. Ferrar*, 70 Cal. App. 3d 48, 55-56, 138 Cal. Rptr. 540, 543 (1977); *Twyford v. Twyford*, 63 Cal. App. 3d 916, 926, 134 Cal. Rptr. 145, 150 (1976).

[13] *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1260-61 & n.14 (11th Cir. 1983); *Span-Deck, Inc. v. Fabcon, Inc.*, 570 F. Supp. 81, 88-89 (D. Minn. 1983) ("The law of the case doctrine is no less applicable here because the question involves the continued viability of jury special verdict findings").

damaged plaintiff wholly apart from its privileged communications. The *Forro II* court correctly determined that the case had no applicability to the present situation inasmuch as all of petitioner's injury resulted directly from the occurrence of the police search as to which the entirety of IBM's causally relevant conduct was privileged. (*Forro II*, App. C, at 33n.2.)

Finally, petitioner asserts that a "conspiracy" claim whereby the police are asserted to have been mere pawns "bought and paid" for by IBM somehow "disappeared" from the court of appeals' analysis of its interference claim. (Petition at 25.)[14] But the fact is that the court expressly noted petitioner's argument, but found no evidence to support it: "Although Forro would have us view IBM as a puppeteer directing the actions of the police, our review of the record convinces us that the evidence provides no basis for inferring that the police were not in charge of obtaining the search warrant and the conduct of the search itself." (*Forro I*, App. A, at 11.)[15]

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[14] Petitioner's present assertion that the police were "bought and paid" for is at odds with its own prior characterization of the evidence. (Petition at 25.) Arguing in opposition to IBM's Motion for Directed Verdict, counsel for petitioner conceded that "[IBM's payment of investigation expenses] wasn't a bribe in the sense that we would know it where the recipient of the money willfully and knowingly accepts the money to disregard his duty." (R 1813.) Given that all the expense money was properly spent and accounted for (R 2075), the best argument that petitioner could offer was that IBM had psychologically predisposed the authorities to credit IBM's claim of trade secret losses. (R 1813-14.)

Moreover, when asked by the trial court at the close of its rebuttal case to identify evidence of conspiracy sufficient to warrant a conspiracy jury charge under Section 2 of the Sherman Act, petitioner abandoned the claim. (R 2686.) With respect to the interference claim, petitioner never even requested a conspiracy instruction. (CR 282.)

[15] Petitioner's accusation of non-feasance on the part of the court of appeals is apparently an effort to camouflage its belated introduction of the new but mistaken argument that the court applied the wrong

(footnote continued on next page)

In sum, the court of appeals fairly addressed and correctly disposed of petitioner's attacks on the dispositive nature of the California statutory privilege.

B. In According Absolute Privilege to IBM's Participation in the Execution of the Search Warrant, the Court of Appeals Correctly Implemented California's Declared Policy of Encouraging Affirmative Citizen Response to Police Requests for Assistance.

While IBM's communications to the authorities are absolutely privileged by operation of an express California statute, no such legislative mandate protects IBM's police-requested assistance in the execution of the search warrant. However, the California Supreme Court has recognized that affirmative citizen response to a police request for assistance is a desirable social objective and has accordingly formulated a principle of common law intended to promote such citizen cooperation. In *Sokol v. PUC*, 65 Cal. 2d 247, 418 P.2d 265, 53 Cal. Rptr. 673 (1966), a telephone company had terminated Sokol's service upon police request and advice that Sokol was using his telephone for illegal purposes. In reviewing Sokol's challenge of that termination, the California Supreme Court held that the telephone company was protected from civil liability since "a contrary rule . . . would discourage cooperation with law enforcement agencies." 65 Cal. 2d at 257-58, 418 P.2d at 272, 53 Cal. Rptr. at 680. In so holding, the California Supreme Court relied and expanded upon an earlier decision according immunity to a citizen who, at police request, effected an

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(footnote continued from previous page)

statute in assessing IBM's communications. Pointing for the first time to California Civil Code § 43.5(a) and the *qualified* nature of the privilege it accords *police officers* executing *arrest* warrants, petitioner asserts without explanation that the *absolute* privilege accorded *IBM's communications* by *independent* statute somehow dissolves. Moreover, petitioner was never arrested by either IBM or the police.

arrest. *Peterson v. Robison*, 43 Cal. 2d 690, 697, 277 P.2d 19, 24 (1954).

With that state-law policy squarely in place, the *Forro I* court undertook an analysis of its applicability to IBM's police-requested search participation. In dealing with this previously unconsidered factual setting,[18] the court catalogued both practical and legal considerations dictating the principle's full applicability. First, a layman would not have been able to identify the technical materials specified in the warrant. (*Forro I*, App. A, at 11.) Although the police authorities made the final determination of what materials would be seized (*Forro I*, App. A, at 11), expert technical advice as to the nature of the information depicted on particular blueprints was essential. (R 665, 2025-27.) Second, California statutory provisions expressly authorize police officers to make requests for citizen assistance. (*Forro I*, A-11, *citing* California Penal Code, § 1530.) Finally, a police officer executing a search warrant valid on its face enjoys absolute immunity by provision of California statute. (*Forro I*, App. A, at 12, *citing* California Penal Code, § 830.6(b).) In view of these circumstances, the court of appeals concluded that a California court would apply the rationale of *Sokol* and *Peterson* to accord immunity to IBM's search participation.

In this Court, petitioner makes no challenge — indeed no mention — of California's clearly articulated policy of encouraging citizen cooperation with police requests for assistance. Rather, petitioner makes a belated and irrelevant attack on the sufficiency of the underlying warrant, contending that expert assistance cannot be used to cure an

[18] *Forro I*, App. A, at 11 n.5. In such circumstances, this Court is particularly hesitant to review the ruling of the court of appeals, particularly where the court of appeals is more likely to be familiar with local law. *United States v. Durham Lumber Co.*, 363 U.S. 522, 526-27 (1960); *Propper v. Clark*, 337 U.S. 472, 488-89, *reh. denied*, 338 U.S. 841 (1949), *reh. denied*, 342 U.S. 907 (1952).

unreasonably vague instrument. (Petition, at 22-24.) But that argument has no relevance to the immunity due a third-party citizen who did not have any role in the preparation of the warrant. Indeed, in the *Peterson* case, the citizen providing police-requested arrest assistance was determined immune from a claim of false imprisonment "even if it be assumed that the imprisonment which followed ... was unlawful." *Peterson v. Robison,* 43 Cal.2d at 698, 277 P.2d at 24.

In sum, the *Forro I* court correctly held IBM's search participation immune. Moreover, petitioner's failure to challenge the validity of the warrant at any previous stage of the proceeding precludes its doing so here. *Delta Air Lines, Inc.* v *August,* 450 U.S. at 362.

III. CONCLUSION.

For the foregoing reasons, International Business Machines Corporation respectfully requests the Court to deny the instant petition for grant of a writ of certiorari.

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May 6, 1985